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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 392

IN THE MATTER OF: THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Debtor.

WALTER E. MEYER,

Petitioner,

vs.

JOSEPH B. FLEMING AND AARON COLNON, AS TRUSTEES OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Respondents.

PETITIONER'S REPLY BRIEF

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Statement

Respondents fail to meet petitioner's argument as to the law.

They discuss matters not referred to in the opinion of the Circuit Court of Appeals and not involved in the issue presented to this Court.

They contend, without justification, that the claim filed herein is without merit.

As to the respondents' statement of the facts connected with the claim herein

Respondents in their brief indulge in statements of an inaccurate nature. Petitioner does not deem it necessary for the purpose of this reply brief to undertake to correct all of these statements.

It is desirable, however, to point out an instance of repeated misrepresentation by respondents. Petitioner in his main brief (p. 31), referring to the order of Judge Moore of the St. Louis Southwestern reorganization court of February 28, 1944, a certified copy of which was filed by respondents with this Court, pointed out that said order was an order denying petitioner's application for an order to show cause why an order should not be made permitting him to continue to prosecute the claim filed by him. Despite this, respondents repeatedly refer to said order as an order denying petitioner leave to prosecute the claim herein.

With respect to remarks reflecting on petitioner's motives in endeavoring to assert the rights and protect the interests of St. Louis Southwestern, petitioner, upon oral argument, will be very glad to answer any question that the Court chooses to direct to him.

In view of the statements contained in respondents' brief, a few salient facts concerning the illegal control exercised over St. Louis Southwestern are here set forth.

Chicago, Rock Island & Pacific Railway Company acquired a dominant stock interest in St. Louis Southwestern in March 1925. It held this dominant stock interest until October 1925. This is admitted by respondents in their brief (p. 4).

Rock Island applied to the Interstate Commerce Commission for authority to acquire stock control of St. Louis Southwestern. C. V. Burnside, Assistant Director of the

Bureau of Finance of the Commission, in a proposed report recommended that the application be denied. Mr. Burnside found that Rock Island was a competitor of the St. Louis Southwestern, and admonished Rock Island for its exercise of control over St. Louis Southwestern without the authorization of the Commission.

Without waiting for a decision by the full Commission upon Mr. Burnside's proposed report, in October, 1925, Rock Island sold its dominant stock interest in St. Louis Southwestern to the Kansas City Southern Railway Company. The Kansas City Southern is also a competitor of the St. Louis Southwestern.

As set forth in the proof of claim herein, the acquisition by Rock Island, a competitor of St. Louis Southwestern, of a controlling stock interest in St. Louis Southwestern was in violation of the Clayton Antitrust Act and also of the Sherman Act, and the sale by Rock Island to the Kansas City Southern, another competitor of St. Louis Southwestern, caused the Kansas City Southern to violate the antitrust laws. The transaction was in breach of the fiduciary relationship that Rock Island was in to St. Louis Southwestern. Rock Island realized a profit of $2,467,000 in the above dealings in St. Louis Southwestern stock for which it is asked in the claim that Rock Island account to St. Louis Southwestern (R. 4-6).

In July, 1926, Kansas City Southern applied to the Commission for authority to acquire stock control of St. Louis Southwestern and Missouri-Kansas-Texas Railroad (a competitor of Kansas City Southern and St. Louis Southwestern), which road Kansas City Southern also controlled without the authorization of the Commission.

The Commission in 1927 denied the applications for unification of the three roads (*Unification of Southwestern Lines*, 124 I. C. C. 401).

In its report the Commission held that the control over St. Louis Southwestern and Missouri-Kansas-Texas by Kansas City Southern without the authorization of the Commission "constituted violations of section 7 of the Clayton Antitrust Act and perhaps also of the Sherman Act" (*Unification of Southwestern Lines*, 124 I. C. C. 401, at p. 430).

The Commission also pointed out the danger to minority stockholders of St. Louis Southwestern by the illegal control thus exercised by Kansas City Southern, through impairment of St. Louis Southwestern's earnings by diversions of traffic, and deterioration of its property and service to patrons. "By these methods," said the Commission, "the price of the stock of the controlled carrier can be depressed and its acquisition by the controlling carrier or its stockholders facilitated" (p. 433).

In 1928, the Commission brought proceedings under the Clayton Act against the Kansas City Southern to compel it to divest itself of its stock interest in St. Louis Southwestern and Missouri-Kansas-Texas.

On April 15, 1929, while the said proceedings under the Clayton Act were pending, a syndicate composed of New York Investors, Inc., its President and Chairman, and others, acquired Kansas City Southern's stockholdings in St. Louis Southwestern (*Interstate Commerce Commission v. Kansas City Southern*, 156 I. C. C. 359, at p. 365).

Leading members of the said syndicate had previously actively participated in the illegal control exercised by Kansas City Southern over St. Louis Southwestern and Missouri-Kansas-Texas. At least in the opinion of minority members of the Commission, the said transaction was collusive and served to continue Kansas City Southern in control of St. Louis Southwestern. (For Commissioner Eastman's dissenting opinion, which clearly shows the collusive nature of this sale by Kansas City Southern to

the syndicate, in which dissent other members of the Commission joined, see *I. C. C.* v. *Kansas City Southern*, 156 I. C. C. 359, at p. 363).

In 1930 and nine months after the beginning of the financial panic in October 1929, Southern Pacific purchased the syndicate's stock interest in St. Louis Southwestern, placed two representatives on the board of St. Louis Southwestern and applied to the Interstate Commerce Commission for authority to acquire stock control of that company. In 1932 Southern Pacific's application was granted by the Commission.

During the period of illegal control from 1925 to 1932, exercised over the St. Louis Southwestern first by Rock Island and then by Kansas City Southern, whether directly or indirectly through the syndicate above referred to, petitioner showed in hearings before the Commission, that by comparison with four other specified Southwestern roads,—the Kansas City Southern, Missouri-Kansas-Texas, Missouri Pacific and St. Louis-San Francisco,—St. Louis Southwestern failed to hold its own and suffered a loss in freight revenues of $27,626,157, and by comparison with the railroads of the Southwestern Region as a whole, of $23,676,728. (See *St. Louis Southwestern Ry. Co. Reorganization*, 249 I. C. C. 5, at pp. 84 *et seq.*)

Rock Island's influence upon the board of directors of St. Louis Southwestern did not cease with the sale of its controlling stock interest to Kansas City Southern. Charles Hayden, Chairman of Rock Island's board of directors, continued as a director of St. Louis Southwestern during the years 1926 and 1927.

As appears from the Commission's report, *St. Louis Southwestern Ry. Co. Reorganization*, 249 I. C. C. 5, at pp. 111 *et seq.*), petitioner charged that Rock Island, taking advantage of its control over St. Louis Southwestern and thereafter conspiring with Kansas City Southern and with Southern Pacific, was able to divert much traffic from

St. Louis Southwestern-Southern Pacific joint routes to joint routes which Rock Island maintained with Southern Pacific.

Petitioner served as a director of St. Louis Southwestern in 1926 and from 1929 to 1934, elected through the votes of the minority stockholders under the system of proportional representation authorized under the laws of Missouri.

Reference is made by respondents in their brief (pp. 5-6) to a suit by petitioner instituted in the Federal District Court in New York, in which it is said he asked that a receiver be appointed to assert the demand for damages on behalf of St. Louis Southwestern.

It is a fact that petitioner in March 1934, after unsuccessful efforts to obtain fair treatment for St. Louis Southwestern, ceased to serve as a director of the company, and instituted a suit in behalf of himself and other stockholders against Southern Pacific, Kansas City Southern, members of important New York banking houses and others. The trustees of Rock Island were named as defendants in the suit but they were not served.

In April 1934, petitioner filed in the Rock Island reorganization proceedings the claim herein for the benefit of St. Louis Southwestern.

On September 6, 1935, the District Court dismissed the complaint in petitioner's representative action on the ground that it lacked subject-matter jurisdiction (*Meyer* v. *Kansas City Southern*, 11 F. Supp. 937). The decision of the District Court was thereafter affirmed by the Circuit Court of Appeals (84 F. (2d) 411), and certiorari was denied by the Supreme Court (299 U. S. 607).

The bill of complaint in the representative action brought by petitioner asked for damages and for an accounting. The Supreme Court had held that a stockholder could not

assert a cause of action under the antitrust laws for the benefit of his corporation either at law or in equity (*Fleitmann* v. *Welsbach Street Lighting Co.*, 240 U. S. 27; *United Copper Securities Co.* v. *Amalgamated Copper Co.*, 244 U. S. 261), Mr. Justice Holmes in the *Fleitmann* case made a suggestion that perhaps if the bill in that case had been framed on a different theory, the decision of the Court would have been otherwise. Petitioner, following the suggestion of Mr. Justice Holmes, therefore asked in his bill of complaint, in addition to the other relief sought, that a receiver be appointed for St. Louis Southwestern for the special purpose of asserting causes of action which the company had under the antitrust laws.

Respondents in their brief (p. 7) make reference to Chairman Eastman's dissenting opinion in the St. Louis Southwestern reorganization proceedings in which Mr. Eastman refers to the conjuring up by petitioner of "conspiracies which go beyond the reasonable probabilities of the situation" (R. 26).

That remark of Chairman Eastman does not refer to the matters so vividly set forth by him in his dissenting opinion, which indicate that he believed that Rock Island had played a leading role in the downfall of St. Louis Southwestern (R. 17, *et seq.*).

Chairman Eastman, it is clear from his opinion, read together with the majority report of the Commission (249 I. C. C. 5, at p. 49), was alluding to the petitioner's charge that Union Pacific continued in control of Southern Pacific long after the decree of the Supreme Court in *United States* v. *Union Pacific*, 226 U. S. 61, dissolving the illegal combination by which Union Pacific controlled Southern Pacific, and that acting under the influence of interests close to Union Pacific, Southern Pacific instigated the filing of the petition for reorganization of St. Louis Southwestern.

It was not alleged by petitioner in the claim herein that Rock Island was in league with Union Pacific. Therefore, whether petitioner was justified in the charge in question is quite beside the issue involved in this case.

As to the reference to *diversions of traffic* in the dissenting opinion, Chairman Eastman stated that he "has not been able to study it with the greatest of care."

As to respondents' discussion of the law

1. Respondents do not effectively controvert the point made by petitioner that if the trustee or receiver fails to take over or to enjoin the prosecution of a suit brought previous to bankruptcy or receivership, it may not be pleaded as a defense that the appointment of the trustee or receiver vested such title in him as to abate the suit (Petitioner's Main Brief, pp. 8 *et seq.*).

They also fail to answer petitioner's argument that subsection (a) of Section 77 of the Bankruptcy Act, which expressly conferred exclusive jurisdiction on the reorganization court, did not serve to differentiate the law in reorganization proceedings from the law in ordinary bankruptcy or equity receivership proceedings so as to preclude the continued prosecution of a suit begun or a claim filed previous to the commencement of reorganization proceedings (Petitioner's Brief, pp. 14 *et seq.*). It was on subsection (a) of Section 77 that the Circuit Court of Appeals relied in holding that whatever the law was previous to its enactment, this subsection prevented the continued assertion of the claim by petitioner in behalf of St. Louis Southwestern (R. 64).

Respondents point to the amendment to the original subsection (a), which gives to the reorganization court "in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a

Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose."

It is their contention that this language of the amendment, read together with subsection (c)(2), which gives to the trustee "if authorized by the judge, the powers of a receiver in an equity proceeding," precludes the continued prosecution of the claim against Rock Island.

A receiver in an equity proceeding does not obtain title to the property of the debtor (*Union National Bank of Chicago* v. *Bank of Kansas City*, 136 U. S. 223). It is difficult, therefore, to see why respondents set such store by this language of the statute.

And, as has been shown, the appointment of a receiver for a corporation does not abate a suit by the corporation or by a stockholder suing for the benefit of his corporation (Petitioner's Main Brief, pp. 8 *et seq.*).

As petitioner has previously stated, there is nothing in the record to show that the trustee of St. Louis Southwestern has been authorized by the judge to exercise the powers of a receiver in an equity proceeding. Assuming that he has been so authorized, respondents do not make the claim that he has exercised such powers.

In all of the cases cited by the respondents in their brief (pp. 15 to 22), the receiver or trustee was appointed previous to the bringing of suit, in contrast to the instant case where the claim was filed previous to the institution of proceedings for reorganization and the appointment of a trustee of St. Louis Southwestern. In a number of the cases cited, the suit was not derivative. In most of these cases the suit was against the directors or officers of the corporation in receivership or bankruptcy.

Four of the cases cited by respondents were referred to in petitioner's main brief (pp. 28-29).

In *Porter* v. *Sabin*, 149 U. S. 473, a stockholders' representative suit against directors of the company, the receiver of the corporation was appointed on May 10, 1884. The stockholders' bill in equity was filed in September 1887, over three years thereafter.

In *Kelly* v. *Dolan* (C. C. A. 3), 233 Fed. 635, another representative action by stockholders against directors, it appears from the opinion of the Circuit Court of Appeals (p. 638), and also from the opinion in the District Court (*Kelly* v. *Dolan*, 218 Fed. 966, at p. 968), that the receiver was appointed previous to the suit.

In *Klein* v. *Peter* (C. C. A. 8), 284 Fed. 797, numerous stockholders filed suit against the company, its officers and managers, claiming that as stockholders they had been defrauded of large sums of money by the acts of said officers. The suit was apparently not a representative action for the benefit of the corporation. At the time the suit was brought, the corporation was in the hands of a receiver (p. 798).

In *Reagan* v. *Midland Packing Co.* (C. C. A. 8), 8 F. (2d) 954, a judgment-creditor endeavored to levy upon the assets of the corporation. At the time of the bringing of the action the corporation was in receivership. (See also *Reagan* v. *Midland Packing Co.*, 298 Fed. 500, 508.)

The other cases cited by respondents are equally ineffective to refute petitioner's contentions.

In *Austin* v. *Garard* (C. C. A. 7), 61 F. (2d) 129, the action was in the nature of a creditors' bill against the trustees of an investment trust. The prayer asked for the appointment of a receiver. Certain stockholders, alleging misconduct on the part of the officers and managers of the trust and seeking no relief in behalf of the corporation as stockholders, sought to intervene in the equity suit. The Court denied the application, holding that the stockholders had misconstrued the object and purpose of a petition to intervene.

Swope v. *Villard* (C. C. S. D. N. Y.), 61 Fed. 417, was an action against directors of the corporation for whose benefit suit was brought. At the time of the commencement of the suit the corporation was in receivership. In *In re Swofford Bros. Dry Goods Co.* (W. D. Mo.), 180 Fed. 549, an action against the corporation and its president, the company was adjudicated a bankrupt on October 28, 1909, and the stockholder's bill was filed on May 20, 1910.

In *Ames* v. *American Tel. & Tel. Co.* (C. C. Mass.), 166 Fed. 820, plaintiff, a stockholder, sought to recover damages from another corporation because of control of his company in violation of the Sherman Antitrust Act. At the time of the commencement of the action the corporation was in the hands of a receiver (p. 823). It was held that the corporation alone could maintain an action at law under the Sherman Act.

In *Lewis* v. *Council* (E. D. N. Car.), 291 Fed. 148, the suit was by a creditor against the officers of the company. The corporation was adjudged bankrupt in November 1920 and a trustee was appointed. The bill was filed in July 1921 (p. 156).

In *Lewis* v. *Lilliston* (U. S. App. D. C.), 89 F. (2d) 847, after a statutory receiver of a banking corporation had been appointed under the laws of Virginia, certain creditors brought suit against the cashier, suing for themselves and all other creditors similarly situated. The Court held that such suit could not be maintained without first showing that the creditors had applied to the court for an order requiring the receiver to bring suit. The Court allowed the plaintiffs to amend their bill by showing that they had made application to the Virginia court.

Respondents inadequately discuss *Adler* v. *Seaman* (C. C. A. 8), 266 Fed. 828, and *Seaman* v. *McCulloch* (C. C. A. 8), 8 F. (2d) 820. That these decisions cannot

be cited in support of the decision of the Circuit Court of Appeals herein appears from the discussion in petitioner's main brief (p. 29).

Respondents incorrectly state in their brief (p. 18), that the cases cited by petitioner do not deal with derivative suits.

Friederich W. Meyer v. *Page*, 112 App. Div. (N. Y.) 625, and *McAnarney* v. *Lembeck*, 97 N. J. Eq. 361, were suits brought by stockholders for the benefit of the corporation. The appointment of a trustee in the *Page* case and of receivers in the *Lembeck* case, the courts ruled, did not preclude the continued prosecution of the stockholder's derivative suit (see petitioner's main brief, p. 14).

2. Respondents argue in their brief (p. 23) that the continued prosecution of the claim must abate because petitioner failed to join the corporation as a party defendant. They refer (p. 24) to the position taken by the Special Master to that effect (R. 36, 43, 45).

The Circuit Court of Appeals in affirming the decision of the District Court did so solely on the ground that subsections (a) and (c)(2) of Section 77 prevented the continued prosecution of the claim. This question, therefore, is not before this Court.

However, it may be stated that after the Special Master in his report had found that petitioner should not be allowed to prosecute the claim because:

> "Neither the corporation nor its trustee in the reorganization proceedings has been brought into the jurisdiction of this court by summons" (R. 36),

petitioner requested that the report be altered to permit him to petition the St. Louis Southwestern reorganization court for authority to join the trustee, and that he be permitted to amend his claim to set forth such authorization and joinder (R. 45).

As to this the Special Master held in his supplemental report (R. 45):

> "* * * For two reasons this request should in my opinion be denied: First, because this is not a claim that may be remedied by amendment; and second, because even if a new claim could be filed, the discretion of this court should not in this instance be exercised to permit such filing, by way of amendment or otherwise."

The Special Master, it is true, regarded the filing of a proof of claim by a stockholder as comparable to the service of a summons and complaint in a stockholder's derivative suit. He reasoned because of this that in connection with the filing of a proof of claim in a reorganization proceeding the beneficiary corporation must be joined. Because of failure to join the corporation, the Master stated, "there is no stockholders' suit now in existence" (R. 43, 45-46).

In no part of his report or supplemental report does the Special Master refer to a case involving a reorganization or bankruptcy proceeding in support of his view that it was necessary to join the corporation or trustee in order to constitute a valid claim. The cases cited by him are representative actions instituted by stockholders for the benefit of corporations.

The filing of a claim in a bankruptcy or reorganization proceeding is not comparable to the institution of a plenary suit but differs from it in a number of ways, as for example:

(1) In a plenary suit the burden is upon the plaintiff to go ahead with his case after issue is joined. By way of contrast, in an ordinary or liquidating bankruptcy proceeding, after a claim has been filed, the burden is upon the party objecting to the claim to go forward with the proof of his objections; in a reorganization proceeding the manner of proof is left to the discretion of the court.

The proof of claim setting forth the facts out of which the claim arises, at least in the ordinary liquidating bankruptcy proceeding, is considered an affidavit or a deposition. It is distinctly not a pleading.

As was stated in *In re Century Silk Mills, Inc.*, 296 Fed. 713 (at p. 714):

> "A sworn proof of claim would ordinarily be prima facie evidence requiring an objector to go forward. It is the objection, not the claim, which is pointed out for hearing and determination. Whitney v. Dresser, 200 U. S. 532, 26 Sup. Ct. 316, 50 L. Ed. 589. * * * The proof of claim is not a pleading, but a deposition, which must set forth the evidence with particularity. Collier on Bankruptcy (13th Ed.), vol. 2, p. 1138."

See also *Bache* v. *Louisiana Oil Refining Corp.* (C. C. A. 5), 97 F. (2d) 445.

(2) Suits instituted by a stockholder for the benefit of a corporation are actions *in personam*. Personal service upon all parties in interest is always necessary in stockholder's suits.

By way of contrast, and as stated in *Hanover National Bank* v. *Moyses*, 186 U. S. 181 (at p. 192):

> "Proceedings in bankruptcy are, generally speaking, in the nature of proceedings *in rem*, * * * *Service of process or personal notice* is not essential to the binding force of the decree." (Italics ours.)

In the ordinary representative action by a stockholder for the benefit of his corporation, it has been held that it is necessary to join the corporation in order "that any decree that shall be made on the merits shall conclude the corporation" (*City of Davenport* v. *Dows*, 18 Wall. 626); otherwise the corporation could renew the litigation in another suit.

The proceedings in bankruptcy being *in rem*, there is not the same necessity for bringing in a party by personal service as there is in the ordinary plenary suit.

(3) Bankruptcy proceedings, in contrast to court actions, are essentially administrative. The methods and procedure of business, not that of the law court, are characteristic of bankruptcy proceedings.

In *Whitney* v. *Dresser*, 200 U. S. 532, this Court held (at pp. 535-536):

> "Bankruptcy proceedings are more summary than ordinary suits. Judges of practical experience have pointed out the expense, embarrassments, and delay which would be caused if a formal objection necessarily should put a creditor to the production of evidence or require a continuance. Justice is secured by the power to continue the consideration of a claim whenever it appears there is good reason for it."

At an early date the Supreme Court, referring to the then Bankruptcy Act, stated:

> "The Act is filled with provisions for quick and summary disposal of questions arising in the progress of the case, without regard to the usual modes of trial * * *." *Wiswall* v. *Campbell*, 93 U. S. 347.

Other courts have held:

> "Proceedings in bankruptcy are flexible and liberal and in their major aspects administrative. Such proceedings are intended to be and usually are carried out informally. Fazakerly v. E. Kahn's Sons Co., supra, 75 F. (2d) 110, page 113." *In re Austin Resort & Land Co.*, 12 F. Supp. 459, at page 462.

> "Bankruptcy is essentially a commercial branch of the law, and its procedure ought to be kept as direct and informal as possible. A party will always be allowed to file such pleadings as are reasonably necessary to make clear his own position. * * *." *In re Ponzi*, 15 F. (2d) 113, at page 114.

(4) In contrast to the relationship between the parties in the ordinary plenary suit or adversary proceeding, the trustee in bankruptcy is in a fiduciary relationship to the claimant.

In *In re Wrisley Co.*, 133 Fed. 388, at page 390, it is stated:

> "He [the trustee] stands to creditors in a fiduciary relation. * * * In all matters between creditors and bankrupt he should stand indifferent."

In *In re Ducker*, 134 Fed. 43, at page 47, it was held:

> "He [the trustee] is not, in fact, more representative of one creditor or claimant than another."

The claimant dealing with the trustee in bankruptcy, his own representative, ordinarily would not hold himself up to or expect to be held up to the observance of technicalities, however fitting and proper they may be in dealings between adversaries.

The courts, recognizing the nature of bankruptcy proceedings and of the filing of a proof of claim, have not required the claimant in bankruptcy proceedings to observe technicalities. This being so, how can it be argued with reason that failure to join the trustee as a party in connection with the filing of the claim renders such filing of the claim invalid?

It has been repeatedly held that it is sufficient to constitute a proper filing of a claim within the limit of time in which claims must be filed, if the trustee within such time gains knowledge that there is such a claim.

In *Scottsville National Bank* v. *Gilmer* (C. C. A. 4), 37 F. (2d) 227, the schedules filed showed that the bankrupt was indebted to the Scottsville Bank in the amount of $7,335. Correspondence of the trustee with the bank indicated that the trustee considered the bank a creditor. No proof of claim had been filed by the bank, however

The bank was allowed to file a proof of claim after the expiration of the time for filing, the Court holding (p. 229):

> "* * * the trend of modern decisions is uniformly toward the greatest liberality in the allowance of the filing of amended proofs of claim, where there is anything in the record to justify such course of action. It would be harsh and inequitable to refuse the relief upon the statements of facts above recited if there were power to grant it."

In *Matter of Kessler* (C. C. A. 2), 184 Fed. 51, certain Paris bankers in an assignment for the benefit of creditors sent to the assignee an account with an accompanying letter showing a balance due them. In the account rendered "there was no verification under oath nor any statement of consideration" (p. 52) necessary to a proof of claim. The account was turned over subsequently to the receiver and to the trustee in bankruptcy. An attorney, at the request of an American representative of the bankers, called upon the receiver and was assured that the claim had been received from the assignee. The Court held that this constituted a filing of a proof of claim and an amendment was allowed.

In re Salvator Brewing Co. (D. C. N. Y.) 188 Fed. 522, held that the evidence given in proceedings in connection with a claim to certain security for notes paid by the directors of a company as endorsers, amounted to proof of the endorsers' claim against the bankrupt estate.

See also *Hutchinson v. Otis*, 115 Fed. 937 (affd. 190 U. S. 552), and *Bennett v. American Credit Indemnity Co.* (C. C. A. 6), 159 Fed. 624.

The test in each case is whether or not within the time for filing of claims the trustee has gained knowledge of the existence of the claim.

Under the provisions of the Bankruptcy Act claims may be filed by an agent.

Section 1 (9) of the Bankruptcy Act states that the term "creditor" as used in that Act "may include his duly authorized agent, attorney, or proxy." General Order 21 (1) provides that when a proof of claim is made by an agent, "it shall state the reason the proof is not made by the claimant in person." Courts, however, have recognized claims filed by parties who have not been formally authorized to file a claim in behalf of the real owner.

An executor, a partner in a bankrupt firm, refused to file a claim for the estate against that firm. The court held that the legatees had a right to file the claim against the bankrupt firm for their respective interests under the will. *In re Lough* (C. C. A. 2), 182 Fed. 961.

A petitioning creditor, one Veler, filed as agent for one James. There was some question as to whether Huffman or James was the real owner of the note which evidenced the indebtedness. The Court held:

> "The fact that Veler, one of the petitioning creditors, held the legal title to his note merely as agent or trustee for James, is not important, in any aspect now involved. * * * Whether Veler held this as agent and trustee for James, or for Huffman, was a matter of no concern to anyone except James and Huffman. * * * Under these conditions, we think it is clear that Veler must be considered a competent and qualified petitioning creditor, and that no fraud or misleading of the court, affecting its original jurisdiction in the bankruptcy matter, can be predicated upon the fact that Veler was acting for some one else." *In re Veler* (C. C. A. 6), 249 Fed. 633, 637.

A seller of land was allowed to prove his debt for the price agreed to be paid even though he had not yet conveyed the title. The court held that "courts of bankruptcy, for the purposes of bankruptcy, including the allowance of claims, have jurisdiction in equity as well as at law, 11 U. S. C. A. § 11, and may allow debts cognizable only in equity." *Burns Mortgage Co.* v. *Bond Realty Corporation* (C. C. A. 5), 47 F. (2d) 985, 987.

In view of the fact that a valid proof of claim has been filed, petitioner submits that if the District Court deemed it advisable or necessary to join the trustee of St. Louis Southwestern, that Court should have granted the request that he be permitted to do so.

3. Respondents state (p. 24) that as a common stockholder whose interest will be wiped out by the plan of reorganization of St. Louis Southwestern, petitioner has no personal interest to serve at the present time, and therefore no amendment of the claim ought to be permitted.

The record shows that petitioner, in addition to his stockholdings, is the owner of First Terminal & Unifying 5% bonds and General & Refunding 5% bonds of St. Louis Southwestern (R. 14-15). If the Commission's present plan of reorganization of St. Louis Southwestern is put into effect, all classes of bondholders will receive both bonds and stock in the new company.

The report and supplemental report of the Interstate Commerce Commission embodying the present plan were rendered June 30, 1941, and March 9, 1942, respectively.

As appears from the Annual Reports of the St. Louis Southwestern, its net income (after fixed charges in the amount of about $3,000,000) for the following years was as follows: *1941*, $4,472,048; *1942*, $5,673,577; *1943*, $7,543,273; *1944*, $8,119,085; and for the first nine months of 1945,* $6,507,850. In terms of earnings per share of common stock, the figures for these years* were as follows: *1941*, $20.23; *1942*, $27.23; *1943*, $38.10; *1944*, $41.45; and for the first nine months of 1945, $33.52.

The Circuit Court of Appeals for the Eighth Circuit has still to pass upon the present plan of reorganization

* Figures from Moody's Railroads published by Moody's Investors Service.

of St. Louis Southwestern. In view of the extraordinary earnings of the property, despite the reports of the Commission, the stockholders of St. Louis Southwestern may not be deprived of their stock, as is assumed by respondents.

4. Respondents argue (p. 25) that not only is petitioner's corporation, St. Louis Southwestern, in reorganization and the St. Louis Southwestern reorganization court has exclusive jurisdiction, but also that the Rock Island is in reorganization and the Rock Island reorganization court has exclusive jurisdiction. They contend that a party who files a claim in a bankruptcy proceeding has to receive leave of the court to do so. For this strange doctrine they cite *Barton* v. *Barbour*, 104 U. S. 126, 128, and *Porter* v. *Sabin*, 149 U. S. 473, 479, both of which cases involve plenary suits and not claims filed by creditors in bankruptcy or receivership proceedings.

Conclusion

For all of the reasons urged in petitioner's main brief and in this reply brief, the judgment of the Circuit Court of Appeals for the Seventh Circuit should be reversed and the cause remanded to that Court with appropriate instructions.

Respectfully submitted,

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